in finding the second appellant guilty of the first charge, and I would therefore quash his conviction on that charge. It follows that his conviction on the other two charges should also be quashed, and I accordingly quash them and order that the sentences on them be set aside and any fines paid by him be refunded.

Now to return to the first appellant, the second charge against him alleged that when he used the car as a pirate taxi there was no insurance cover in relation to such user. The uncontroverted evidence was to the effect that the car was registered with the Road Transport Department for private use only and that the insurance certificate produced by the first appellant did not cover use for hire or reward.

But the legal argument made on his behalf in the lower court, which argument is repeated before me, is that by virtue of paragraph (k) of section 79 the use of the car as a pirate taxi *was* covered by the policy.

To understand this argument, it is necessary to look at certain provisions of the Ordinance.

Sub-section (1) of section 74 provides —

"Subject to the provisions of this Part of this Ordinance it shall not be lawful for any person to use... a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person... such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Ordinance."

Sub-section (2) prescribes the penalty for contravening the above provision.

Sub-section (1) of section 75 provides —

"In order to comply with the requirements of this Part of this Ordinance a policy of insurance must be a policy which —

(a) [not relevant];

(b) insures such person, persons... as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle... on a road....."

Then sub-section (4) of the same section provides that a policy shall be of no effect for the purposes of this Part of the Ordinance unless and until there is delivered by the insurer to the insured a certificate of insurance in the prescribed form. This certificate must contain such particulars of any conditions subject to which the policy is issued.

Finally section 79 (in so far as material) provides —

"Where a certificate of insurance has been delivered under sub-section (4) of section 75 of this Ordinance to [the assured], so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to....

(k) the motor vehicle being used for a purpose other than the purpose stated in the policy;

shall, as respects such liabilities as are required to be covered by a policy under paragraph (b) of subsection (1) of section 75 of this Ordinance, be of no effect:

Provided that nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this section shall be recoverable by the insurer from that person."

This paragraph (k) is new, being added to the section by Act No. 21 of 1967.

I think that the learned magistrate was right in holding that that paragraph made no difference to the first appellant's criminal liability under sub-section (1) of section 74. That sub-section says that he could not use this car on the day in question unless there was in force in relation to the use of that car by him such a policy of insurance in respect of third party risks as complied with the requirements of Part IV of the Ordinance. The certificate of insurance clearly stated that the policy did not cover use for hire or reward. All section 79 says is that this restriction in the policy shall have no effect only as regards the first appellant's *civil liability towards third parties*. In other words, notwithstanding this restriction the insurer remains ultimately liable to compensate third parties injured by the assured, because (as made clear by the proviso) if the insurance company pays any sum to third parties by virtue of this section, then it may recover that sum from the assured. Section 79 is concerned only with civil liability: it does *not* affect the first appellant's *criminal* liability.

I am therefore of the opinion that the first appellant was rightly convicted on the second charge.

I am of the opinion that he was also rightly convicted on the third charge.

The sentences on all the three charges are not excessive.

I would therefore dismiss his appeal against conviction and sentence.

Finally I turn to the order confiscating the car in question. In view of my conclusion that the managing director of the company was not aware of the illegal use to which the car was put by the first appellant, I order that the car be returned to the company.

Order accordingly.

Solicitors: *Chellappah Thambiah & Co.*

TEE GEOK TONG & ANOR. v. TAN KIM HONG & ORS.

[O.C.J. (Mohamad Azmi J.) June 15, 1973]
[Kuala Lumpur — Civil Suit No. 473 of 1969]

Tort — Negligence — Duty of care — Contributory negligence.

In this case the facts were that a motor-lorry driven by the first defendant got stuck in the ground. The first defendant inserted a metal plate under the rear-side rear wheel of the motor-lorry and then started the lorry. The rear wheels began to spin and the metal plate flew backwards and hit the deceased, a bystander, who was then nearby standing behind the lorry. The second defendant saw the deceased coming near the lorry when it got stuck but neither he nor the attendant warned the deceased of the danger of standing behind the lorry.

Held: (1) it was the duty of the defendants to exercise reasonable care to ensure that there were no persons within the area of potential danger before starting the engine of the motor-lorry and therefore the defendants were liable in negligence;

(2) there was contributory negligence on the part of the deceased and liability would be apportioned on the 50:50 basis.

Cases referred to:-

(1) *Grant* v. *Australian Knitting Mills Ltd. & Ors.* [1936] A.C. 85 at p. 103.
(2) *Hay* v. *Young* [1943] A.C. 92 at p. 104, 116 and 117.
(3) *Searle* v. *Wallbank* [1947] A.C. 341 at p. 351.
(4) *The Wagon Mound (No. 2)* [1966] 2 All E.R. 709.
(5) *Bolton* v. *Stone* [1951] A.C. 850.

Authorities cited other than those referred to in judgment: *Roe* v. *Minister of Health* [1954] 2 Q.B.D. 66 @ 84; *Joginder Kaur* v. *Malayan Banking Ltd.* [1971] 1 M.L.J. 98 F.C. @ 102; *Donoghue* v. *Stevenson* [1932] All E.R. Rep. 1 @ 11; *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co., Ltd.* [1961] 1 All E.R. 404 P.C.; *Bennett* v. *Chemical Construction (GB) Ltd.* [1971] 3 All E.R. 822 C.A.; *Hughes* v. *Lord Advocate* Charlesworth on Negligence, Fifth Ed. p. 40; *Stewart* v. *West African Terminals* [1964] 2 Lloyd's Rep. 371.

CIVIL SUIT.

M. Segaram for the plaintiffs.

N. A. Marjoribanks for the defendants.

Mohamed Azmi J.: This is a claim for damages under sections 7 and 8 of the Civil Law Ordinance, 1956 by the personal representatives of one Low Hoe Ping who died on April 23, 1968 as a result of injuries sustained when he was struck by a metal plate which flew off from underneath the rear near-side wheel of motor lorry No. BM 4928 owned by the third defendant.

From the pleadings and the statement of agreed facts, the incident occurred in this way. On April 21, 1968 at about 12.30 p.m. motor lorry No. BM 4928, which was being driven by the first defendant into Jugra Estate Banting, got stuck in the ground. After inserting a metal plate under the near-side rear wheel of the motor lorry, the first defendant started the vehicle whereby the rear wheels began to spin and the metal plate flew backwards and hit the deceased, who was then nearby standing behind the lorry. When the first defendant started the engine of the motor lorry, the second defendant (who as in the case of the first defendant, was also the servant or agent of the third defendant) was on the ground at the side of the motor lorry near the driver. The second defendant saw the deceased coming near the motor lorry where it had got stuck. He also saw the deceased standing near the near-side of the rear wheel, but neither the first defendant nor the second defendant gave any warning to the deceased of the danger of standing behind the motor lorry.

On the above agreed facts, Mr. Segaram submits that the plaintiffs have proved negligence on the part of the first and second defendants. However, at the close of the case for the plaintiffs, Mr. Marjoribanks, who appears for all the three defendants, submits that there is no case to answer and elects not to call any evidence. The first main point taken by Mr. Marjoribanks is that the plaintiffs have failed to show that there is a duty to take care on the part of the defendants. He based his argument on the judgment of the Privy Council in *Grant* v. *Australian Knitting Mills, Limited, & Ors.*,[1] *Hay* v. *Young*[2] and *Searle* v. *Wallbank*.[3] It is submitted that the test of such duty depends on what one should foresee and that mere possibility of accident is not enough to establish liability. In the present case, the metal plate that struck the deceased was 1½ feet by 7 feet, and having regard to its size, it is argued that the defendants could not have foreseen that it would fly off. The second main point taken by Mr. Marjoribanks is that, even if liability is proved, there is contributory negligence on the part of the deceased.

On the first point, it should be noted that the accident happened along a laterite road in Jugra Estate as shown in the sketch plan and the photographs in the agreed bundle of documents. It is also agreed that about eighty yards away from the place where the motor lorry got stuck, there were some people collecting firewood. It can therefore be reasonably inferred that the estate road where the accident occurred is one to which the public or many people have access. Accordingly, it is my considered opinion that in this particular instance, as soon as the second defendant saw the deceased coming near the motor lorry and staying behind the lorry close to the rear near-side wheel, under which the metal plate had been inserted, the duty to take care existed; and if he or the driver failed to take any reasonable step to exercise due care, a case of actionable negligence would arise. As regards foreseeability, it is a question of fact since it is only by an inference to the circumstances of each case under consideration that it could be determined. (See *Charlesworth* on Negligence, Fifth Edition, at page 17, paragraph 29). As to the precise meaning to be attached to the words "foreseeable" and "reasonably foreseeable", the matter has been dealt with by Lord Reid in the case of *The Wagon Mound (No. 2)*[4]. At page 718, after dealing with the case of *Bolton* v. *Stone*[5] (the cricket ball case), where the House of Lords held that the risk was so small that in the circumstances a reasonable man would have been justified in disregarding it and taking no steps to eliminate it Lord Reid, however, went on to say:

> "It does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so: e.g., that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it. If the activity which caused the injury to Miss Stone had been an unlawful activity there can be little doubt but that *Bolton* v. *Stone*[5] would have been decided differently. In their Lordships' judgment *Bolton* v. *Stone*[5] did not alter the general principle that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man. What that decision did was to recognise and give effect to the qualification that it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it."

In the present case, the admitted facts disclosed that the defendants' lorry got bogged down on the laterite road. To get the vehicle going, a metal plate was inserted underneath the rear near-side wheel. The question is, could the defendants have foreseen the accident? I do not agree with the submission that having regard to the nature of the metal plate, the possibility that it would come out was so remote that it was impossible for the defendants to anticipate. Such occurrence is not uncommon when a vehicle got stuck in the ground. The fact that the wheels would be spinning when the engine is started and thereby throwing any object underneath them backwards cannot be said to be so remote as to excuse a reasonable man

from taking reasonable steps to avoid the risk of causing injuries to others within the area of potential danger. When the first defendant started the engine, the second defendant knew that the deceased was standing very close behind the lorry near the rear near-side wheel. Since the vehicle was going forward and having regard to the nature of the road and the dangerous position of the deceased in relation to the metal plate, I find there was a real and substantial risk or chance that the metal plate would fly off backwards hitting anyone who happens to be on its path. In failing to warn the deceased from standing within the area of potential danger, the first and second defendants must be regarded as negligent under the circumstances of the present case. In my judgment, it is the duty of the defendants to exercise reasonable care by ensuring that there are no road users within the area of potential danger before starting the engine of the motor lorry. The negligent act of the defendants is not so much in the insertion of the metal plate under the wheel but rather in starting the engine when the deceased was behind the lorry and where there was a real risk that the metal plate would fly backwards. The act of the defendants involves lack of due care and attention; and since the duty to take care exists, I find them liable for negligence. To my mind, this case does not come within the qualification recognised in *Bolton* v. *Stone (ante)* as to the general principles that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man.

On the second point, Mr. Segaram concedes that there is contributory negligence on the part of the deceased. I think a bystander like the deceased who failed to take reasonable steps to protect himself from obvious danger could not be completely free from blame. Having regard to all the circumstances, it would be equitable that liability in this case should be apportioned on the 50: 50 basis.

As regards quantum, special damages have been agreed to at $1,100 on 100 per cent liability. As regards general damages, both parties have agreed on loss of dependency at $170 per month. As to the number of years purchase, I have taken into consideration the fact that the deceased was a pig-breeder by occupation and was forty-one years of age at the time of his death. From the uncontradicted evidence of the deceased's widow (PW1), the deceased was a healthy man prior to his death. Taking into consideration the other contingencies in life, I consider fourteen years purchase would be fair and reasonable in this case. On 100 per cent liability, general damages would come to $20,196. For the claim under section 8 of the Civil Law Ordinance, I would award a sum of $3,000 on behalf of the estate of the deceased. This sum will, of course, merge into the award under section 7. Under the circumstances, I enter judgment for the plaintiffs in the sum of $550 as special damages and $10,098 as general damages and costs. As regards special damages, I order that the sum of $550 be paid direct to the widow. With regard to general damages, I order that the sum of $10,098 be apportioned as follows: —

(i)	Widow - - - - - - -	$4,348
(ii)	Low Soh Hee (f) - - - -	$ 250
(iii)	Low Soo Chow (f) - - - -	$ 500
(iv)	Low Tong Kiew (m) - - - -	$ 500
(v)	Low Tong Wah (m) - - - -	$ 500
(vi)	Low Soh Kim (f) - - - -	$ 500
(vii)	Low Tong Po (m) - - - -	$1,000
(viii)	Low Tong Howe (m) - - -	$1,000
(ix)	Low So Hun (f) - - - -	$1,500

Money payable to the minor children Nos. (iii) to (ix) to be paid to Public Trustee in trust for them until they reach the age of majority.

As regards interest, I award 3 per cent on special damages from date of accident (April 21, 1968) to date of judgment, and 6 per cent on general damages from date of service of writ (April 15, 1969) to date of judgment.

Order accordingly.

Solicitors: *M. Segaram & Co.; Lovelace & Hastings.*

ALI MAT BIN KHAMIS v. JAMALIAH BINTI KASSIM

[A.C.J. (Wan Suleiman J.) September 11, 1973]
[Seremban — Civil Appeal No. 1 of 1971]

Practice and Procedure — Jurisdiction of Magistrate's Court — Action or suit for recovery of immovable property — Question of title raised — Harta Sapencarian — Whether High Court has jurisdiction to hear case — Subordinate Courts Act, 1948, s. 70 — Administration of Muslim Law Enactment, Negri Sembilan, 1950, s. 41(3) — Courts of Judicature Act, 1964, s. 23.

Malay Customary Law — Adat — Harta sapencharian — Whether High Court has jurisdiction to deal with.

The appellant had claimed possession of a house and land which he claimed he purchased. The respondent was the wife of the appellant but after she was divorced, she continued to stay in the house. The respondent claimed that the land and house was *harta sapencarian*. The learned magistrate decided that he had no jurisdiction as on the pleadings the dispute related to the title to immovable property. He also held that the Court of the Kathi Besar had exclusive jurisdiction on the issue of *harta sapencarian* and that that court should adjudicate on that issue before anything further could be done. The appellant appealed.

Held: (1) in this case what appeared at first to be an action for the recovery of possession of immovable property had in view of the defence become one in which the question of ownership of the property was raised and therefore the learned magistrate had rightly decided that he had no jurisdiction to hear the case;

(2) the High Court had jurisdiction to deal with the issue of *harta sapencarian* and therefore the action should be transferred to the High Court.

Case referred to:-

(1) *Hiew Kim Swee* v. *Gomez* [1955] M.L.J. 170 at p. 174.

CIVIL SUIT.

K. Gunaretnam for the appellant.

Leow Shin Fong for the respondent.

Wan Suleiman J.: This is an appeal brought against the decision of the learned magistrate, Serem-